

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2004-009286

08/23/2005

HONORABLE BARRY C. SCHNEIDER

CLERK OF THE COURT
C. Johnston
Deputy

FILED: 08/25/2005

JANE DOE

SUSAN ANDERSON
JANE E REDDIN

v.

JOE ARPAIO, et al.

JOSEPH I VIGIL

SUSAN L HABLE

MINUTE ENTRY

Plaintiff's Motion for Summary Judgment and Defendants' Cross-motion for Summary Judgment have been under advisement.

IT IS ORDERED GRANTING Plaintiff's Motion for Summary Judgment and **DENYING** Defendants' Motion for Summary Judgment.

As to the issue of mootness, the court agrees with Plaintiff that given the limited duration of women's pregnancies and the limited duration of jail sentences at the Maricopa County Jail, the mootness doctrine should not prevent the issues being addressed on their merits.

As noted by the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113, 125 (1973): "Pregnancy provides a classic justification for non mootness. It truly could be capable of repetition, yet evading review."

Plaintiff challenges Defendant Arpaio's unwritten transportation policy which requires a court order to allow transport of an inmate to obtain an abortion. The policy provides no guidelines for the court to consider in deciding whether to allow transport or not. Defendants concede that they have never opposed any inmate's request for a transport order to obtain an abortion.

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Defendants offer a number of purposes to be served by the policy. Defendants purposes include: (1) security of the inmates and others; (2) limiting liability exposure, *i.e.*, liability to third persons who may have an interest in the unborn fetus or for complications related to the abortion; and (3) ensuring that Defendants do not violate the law prohibiting the use of public funds for an abortion.

There is a question remaining as to the appropriate test to be used in determining the constitutional issue. There is the undue burden test articulated in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). Applying this test, the State may not adopt a regulation that places a substantial obstacle in the path of a woman seeking an abortion. In this case, since the Plaintiff was incarcerated, there is the argument that the more restrictive test of *Turner v. Satley*, 482 U.S. 18 (1987) applies. The *Turner* test looks to whether a regulation reasonably relates to a legitimate penological interest. The first of four factors enunciated is whether the regulation has a "valid, rational connection" to a legitimate government interest. *Turner*, 482 U.S. at 89.

Defendants argue that the *Turner* analysis applies and rely heavily on the recent fifth circuit opinion in *Victoria W. v. Larpenster*, 369 F.3d 475 (5th Cir. 2004). Plaintiff argues that no matter what test is applied the Defendants' policy cannot pass constitutional muster. Plaintiff relies heavily on *Monmouth County Correctional Institutional Inmates V. Lanzaro*, 834 F.2d 326 (3rd Cir. 1987).

If the undue burden test is applied, Plaintiff argues that forcing a pregnant inmate to obtain a court order unduly burdens the inmate. Since abortions are so time sensitive, any delay will inevitable result in an undue burden. We need to look only to the facts of this case to appreciate why this is true. Initially, the request for a court order was denied. It took several weeks, and then just before the end of the first trimester, until the second judge fortunately intervened and signed the order. The court agrees with Plaintiff that if this test applied, the policy is unconstitutional.

Even if the *Turner* test applies, Plaintiff argues that no reasonable penological purposes are served by the policy. The court also agrees with this argument.

Applying the *Turner* test, what is significant to the court, as pointed out by Plaintiff, is that there is no policy requiring a court order for the transport of inmates for special events such as visiting sick relatives, attending viewings of deceased relatives, or hearing a will read. How then can there be a reasonable legitimate penological interest in the security of inmates if one category of inmates must obtain a court order and inmates in the other categories are not similarly restricted? How, also, can there be a reasonable interest in security if Defendants never oppose a request for a court order for transport and offer the court no guidelines to inform its decision? The true answer to these questions is that while Defendants mouth concerns for security, what is actually at stake is an interest to deflect what may be politically unpopular decisions and put those decisions at the feet of the court. Even assuming that this court is being unduly harsh and skeptical in attributing these political concerns to Defendants, the court agrees

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with the analysis of the majority in *Monmouth County* that when the decision to require a court order depends on the nature of the treatment or reason for transport, and, not the security risk imposed by the individual inmate, there is no legitimate penological purpose. *Monmouth County*, 834 F.2d at 338.

With respect to the liability concerns of third persons who may have an interest in the fetus, Defendants argue that the requirement of a court order eliminates any exposure. How can that be when these third persons are not given notice of the request for the transport order? How can a court order create immunity and be binding against such third persons when these persons were never given an opportunity to be heard? The answer is that the requirement of a court order cannot eliminate whatever rights these third persons may have. Perhaps more importantly, Defendants have no answer to the argument and authority of Plaintiff that these third persons possess no right to veto a mother's decision to abort.

Similarly, the signing of a court order cannot result in the grant of immunity to the Defendants if complications arise during or after the procedure.

As to the third purpose, the avoidance of Defendants violating the law prohibiting expenditure of funds for an abortion, this concern loses its validity as long as the inmate arranges to pay for the procedures, as occurred in this case. Also, the law prohibits public funds being "expended for payment to any person or entity for the performance of an abortion." A.R.S. §35-196.02. Providing transportation is not paying for the performance of an abortion.

It is noted that another purpose has been offered by Defendants through the deposition of the sheriff's director of intergovernmental affairs, but not included in their argument. That deponent also suggested that protecting the sheriff from adverse publicity justified the policy. Since this argument has apparently been abandoned, there is not need to address it.

As noted, Defendants rely on *Victoria W.* in which the fifth circuit upheld the constitutionality of a Louisiana prison policy requiring a court order to transport an inmate for an abortion. *Victoria W.* is distinguishable factually. The Plaintiff in that case sued for damages because she was unable to obtain the court order required by the County. Summary judgment was granted in favor of the defendants and affirmed on appeal. The transport would have involved a one-way, one-hour trip and a three night stay in the hospital. In this case, abortions are obtainable locally. In this case, Defendants permitted transports for other purposes without court order. Not so in *Victoria W.*

Even without the factual distinctions, this court finds the reasoning in *Monmouth County* more persuasive than *Victoria W.*